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Centro De La Familia De Utah, a Utah non-profit corporation v. Bonita Carter, individually and in her capacity as Trustee of The Carter Family Foundation; and Dream Chaser, LLC, a Utah limited liability company : Reply Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

CENTRO DE LA FAMILIA DE UTAH, a Utah non-profit corporation, Plaintiff and Appellant, vs. BONITA CARTER, individually and in her capacity as Trustee of THE CARTER FAMILY FOUNDATION; and DREAM CHASER, LLC, a Utah limited liability company, Defendants and Appellees.	Appeal No. 20030441-SC

REPLY BRIEF OF APPELLANT

APPEAL FROM THE ORDER OF THE THIRD JUDICIAL DISTRICT COURT, HON. J. DENNIS FREDERICK, REFUSING TO GRANT INJUNCTIVE RELIEF

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RESPONSE TO STATEMENT OF ISSUES PRESENTED FOR REVIEW

CDLF, in its initial brief, presented a single issue for review (*i.e.*, "Did the trial court err when it denied Appellant's motion for preliminary injunction?), and the Carters agree with CDLF's description of this issue and the standard to be applied.

In its Minute Entry Ruling, the trial court stated only that it denied the motion for preliminary injunction "for the reasons specified in the opposing memoranda [sic] and as articulated at oral argument."[1] (R. 550; Appendix K.) The trial court's Findings of Fact and Conclusions of Law were prepared by the Carters and entered without change.

CDLF therefore agrees that, in addition to the main issue for review, there are sub-issues involving different standards of review, as follows: (1) applying a legal correctness standard, *Nunley v. Westates Casing Servs., Inc.*, 1999 UT 100, ¶ 42, 989 P.2d 1077, whether Utah R. Civ. P. 52(a) requires CDLF to marshal the evidence under the circumstances of this case, and whether it has or has not done so; and (2) applying a legal correctness standard, *Husaker v. Kersh*, 1999 UT 106, ¶ 6, 991 P.2d 67, whether the trial court applied the correct standards when ruling on the first (irreparable harm) and

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[1] The Utah Court of Appeals has "specifically condemned the practice employed by the district court in this case [*i.e.*, Judge Frederick] wherein the court merely grants the motion for the reasons set forth in the [prevailing party's] supporting memorandum . . . [without] explain[ing] the basis for its decision.'" *Russell/Packard Dev. v. Carson*, 2003 UT App 316, n. 6 (*quoting Gabriel v. Salt Lake City Corp.*, 2001 UT App 277, ¶ 9, 34 P.3d 234). While the latter case concerned a Rule 12(b)(6) dismissal, and no findings or conclusions were entered, in substance the same situation prevails here because the trial court has never itself specified the reasoning for its ruling on the multiple issues.

fourth (likelihood of success on the merits of the underlying claim) factors of the Rule 65A(e) test for an injunction to issue.

ARGUMENT

POINT I

CDLF IS NOT REQUIRED TO MARSHAL THE EVIDENCE, AND IN ANY EVENT IT SUBSTANTIVELY DID SO

A. CDLF was Not Required to Marshal The Evidence.

The Carters mischaracterize the basis for CDLF's challenge to the marshaling requirement. CDLF's challenge is not "simply because the lower court did not hear live testimony," as the Carters contend. (Appe. Br. at 7.) It is instead based on the language of Utah R. Civ. P. 52(a), and on the policy that this Court has said justifies the requirement.

Rule 52(a) does not expressly require an appellant to marshal the evidence in support of the trial court's findings of fact entered in connection with an interlocutory injunction. The language of Rule 52(a) is similar to the Federal Rules of Civil Procedure. *State v. Walker*, 743 P.2d 191 (Utah 1987). As this Court stated in *Walker*, "The definition of `clearly erroneous' in the federal rules comes from *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 542, 92 L.Ed. 746 (1948): `A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court

on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Id.* at 193. Thus, the Court concluded:

> the content of Rule 52(a)'s "clearly erroneous" standard, imported from the federal rule, requires that if the findings (or the trial court's verdict in a criminal case) are against the clear weight of the evidence, *or* if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings (or verdict) will be set aside.

Id. (emphasis added).

The stated policy supporting a marshaling requirement is absent in this case. This Court has stated that the deference accorded the trial court's findings of fact under a clearly erroneous standard follows from the trial court's "advantaged position to evaluate the evidence and determine the facts." *Utah Med. Prods., Inc. v. Searcy*, 958 P.2d 228, 232 (Utah 1998). Accordingly, when a Utah trial court chooses to rule on an interlocutory injunction without conducting an evidentiary hearing, and there are disputed material facts, the marshaling requirement is no longer justified because the trial court does not occupy an advantaged position in relation to the reviewing court.

An appellant's obligation to marshal the evidence under the circumstances of this case does not appear to have been addressed by this Court, but the Utah Court of Appeals has written persuasively in favor of such a proposition:

> . . . Normally we would review this determination [i.e., the trial court's judgment revoking consent to adoption] by the fact finder under the standard set forth in Utah R. Civ. P. 52(a), giving great deference to the trial judge's ability to assess the credibility of witnesses and setting aside the finding only if clearly erroneous. However, because no evidentiary hearing was held,

> Judge Moffat had before him only the affidavits of the natural mother, the counselor, and the obstetrician, described above, the transcript of the June 24 appearance before Judge Murphy, and the natural mother's consent to adoption executed that day. Because the trial court' s finding was based solely on these written materials and involved no assessment of witness credibility of competency, this court is in as good a position as the trial court to examine the evidence *de novo* and determine the facts.

Matter of Adoption of Infant Anonymous, 760 P.2d 916, 918 (Utah App. 1988).

This Court's case law lends further support to the proposition: " Questions of contract interpretation not requiring resort to extrinsic evidence are matters of law, and on such questions we accord the trial court's interpretation no presumption of correctness." *Zions Nat'l Bank, N.A. v. National Am. Title Ins. Co.*, 740 P.2d 751 (Utah 1988).

In *Sackler v. Savin*, 897 P.2d 1217 (Utah 1995), this Court considered a real estate dispute focusing on whether an agreement had been reached. The question was to be determined using only correspondence between the parties. The Court stated: "In refusing to enforce the settlement agreement, the trial court based its decision solely on the documents constituting the correspondence between the parties. Because the trial court took no extrinsic evidence, we review for correctness." *Id.* at 1220.

In support of their response the Carters quote language from Utah R. Civ. P. 52(a), which states in part that the trial court's findings of fact, "`whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. . . .'" (Appe. Br. at 6.) They then look to the Advisory Committee Notes to Fed. R. Civ. Rule 52(a), as

amended in 1985, to construe this language to mean that *any* finding of fact entered by a trial court is subject to a clearly erroneous standard, and also a marshaling requirement.

Those Notes, which the Carters have quoted only partially, purport to justify an unvarying standard of review based on the Advisory Committee's belief that "the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of facts." As the Advisory Committee acknowledged, as of the 1985 amendment to Fed. R. Civ. P. 52(a), the federal circuits of appeal had disagreed on the application of a blanket standard of review, the treatise writers disagreed on the proper interpretation of the rule, and the U.S. Supreme Court had not clearly resolved the issue. Echoing the Utah Court of Appeals' reasoning in *Matter of Adoption of Infant Anonymous*, some circuit courts had held that, as summarized by the Advisory Committee, when "a trial court's findings do not rest on demeanor evidence and evaluation of a witness' credibility, there is no reason to defer to the trial court's findings and the appellate court more readily can find them to be clearly erroneous."

The Advisory Committee Notes to the Federal Rules of Civil Procedure have not been incorporated into the 1987 amendment of Utah R. Civ. P. 52(a). This Court is free, of course, to interpret the Utah Rules of Civil Procedure as it sees fit. Further, the federal appellate courts do not apply the "clearly erroneous" standard as strictly as the Carters suggest. Those courts do not impose an overt marshaling of evidence requirement, and

there are nuances in the application of the "clearly erroneous" standard. *See, e.g., Easley v. Cromartie*, 532 U.S. 234, 242-43 (2001) (reviewing three judge District Court's findings of fact on legislative redistricting plan, and stating: "the trial here was not lengthy and the key evidence consisted primarily of documents and expert testimony. Credibility evaluations played a minor role. Accordingly, we find that an extensive review of the District Court's findings, for clear error, is warranted. That review leaves us with the definite and firm conviction, . . ., that the District Court's key findings are mistaken." Internal citations omitted.).

Following the federal courts' treatment of Rule 52(a), the "clearly erroneous" standard should be given flexibility to account for nuances in the types of trial court proceedings, including relaxing the marshaling requirement under certain circumstances. Utah appellate courts can review a trial court's findings for clear error without requiring the appellant to marshal the evidence in support of the findings. In such cases, it should be enough that the appellant can point to evidence in the record that creates a definite and firm conviction that the trial court's findings are mistaken. *Walker*, 743 P.2d at 193.

In this case, the trial court ruled on the interlocutory injunction without holding an evidentiary hearing, and before the parties had conducted any discovery. The evidence before the court consisted of affidavits and documentary exhibits thereto. There were no stipulated facts. The credibility of the affiants was at issue. The trial court asked no questions of counsel at oral argument and made no comments, and issued a Minute Entry

Ruling denying CDLF's motion for preliminary injunction "for the reasons specified in the opposing memoranda [sic] and as articulated at oral argument." (R. 550; Appendix K.) The Carters prepared proposed findings and conclusions that were so one-sided as to not even find inferential support in the record, and amended findings were submitted. The trial court entered those amended findings and conclusions, which went beyond what was required to rule on the interlocutory injunction factors. Under these circumstances, CDLF should not be required to marshal the evidence in support of the findings.

B. CDLF Substantively Marshaled The Evidence.

In the event CDLF is required to marshal the evidence in support of the trial court's findings, it has substantively complied with that obligation. This Court's cases do not impose a specific format for marshaling the evidence. CDLF's initial brief refers to and discusses every fact mentioned in the trial court's findings, with the sole exception of the pledge agreement referenced in the Carters' response brief. Undisputably, CDLF marshaled the single fact in support of the trial court's finding on irreparable harm; namely, the *Deseret News* article attached to Mrs. Carters' affidavit and the basis for Finding of Fact ¶ 33. The same can be said of CDLF's discussion of the facts in support of the likelihood of success on the merits factor.

POINT II

CDLF HAS SHOWN THE TRIAL COURT'S DENIAL OF INJUNCTION WAS CLEARLY ERRONEOUS

A. CDLF Has Shown Irreparable Harm

1. The trial court applied an incorrect legal standard to decide whether CDLF's evidence of harm was not speculative.

The trial court's conclusions of law are reviewed for correctness. *Utah D.O.T. v. G. Kay*, 2003 UT 40, ¶ 5.

Contrary to the Carters' apparent contention, CDLF, in its initial brief, did challenge the trial court's legal conclusion that CDLF's showing of irreparable harm is legally speculative. (App. Br. at 27.) The trial court's Conclusion of Law ¶ 23 cites *System Concepts, Inc. v. Dixon*, 669 P.2d 421 (Utah 1983) in support of the conclusion that "speculative assertions of harm are inadequate."[2] The latter opinion, though, nowhere uses the phrase "speculative harm" to describe the basis for the decision in that case, and the trial court's Conclusions of Law do not refer to the standard that is articulated therein. It is therefore unclear what, if any, legal standard the trial court applied to conclude that CDLF's showing of irreparable harm is "speculative."

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[2] In its Conclusions of Law, the trial court stated: "CDLF's claim that it has met the requirement of irreparable harm depends on the speculative fear that the Migrant Head Start program operated on the Property could not relocate to another facility and would have to close. Such speculative assertions of harm are inadequate. *System Concepts, Inc. v. Dixon*, 669 P.2d 421 (Utah 1983)." As CDLF points out in its initial brief, the sole factual basis for this conclusion is the trial court's Finding of Fact ¶ 33: "The October 7, 2000 *Deseret News* article refers to a Provo Migrant Head Start center operated by CDLF being shut down. Carter Aff. Ex. 4. CDLF worked with licensed providers to find day care for the affected children and successfully accommodated a few children it [had] at another facility it operated." (Appendix L.)

"The [trial] court's construction of an applicable legal standard . . . is reviewed for correctness; we [the appellate court] afford no deference to the court's interpretations of law." *Hunsaker*, 991 P.2d at 69.

As explained in CDLF's initial brief, this Court has defined irreparable harm as "[w]rongs of a repeated and continuing character, *or* which occasion damages that are estimated only by conjecture, and not by any accurate standard. . . . `Irreparable harm' justifying an injunction is that which cannot be adequately compensated in damages *or* for which damages cannot be compensable in money." *Id.* (internal quotations omitted) (*quoting Dixon*, 669 P.2d at 427-28).

Although this Court does not appear to have ever addressed the precise issue of what harm is not speculative, it has stated that the burden of showing irreparable harm requires evidence of a "likely or threatened occurrence" of harm. *Dixon*, 669 P.2d at 428. *Cf., Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (holding "that a plaintiff who can show a significant risk of irreparable harm has demonstrated that the harm is not speculative.").

In their response brief, the Carters make no real attempt to defend the trial court's single finding on harm that purportedly supported its legal conclusion that CDLF's evidence was "speculative"; in other words, the Carters do not show how the October 7, 2000 *Deseret News* article that was attached to Mrs. Carter's affidavit established that CDLF cannot prove the existence of a "likely or threatened occurrence" of harm.

Further, they do not show how, standing alone, the evidence presented by CDLF is legally "speculative."

In fact, the evidence presented by CDLF easily demonstrated that the harm is not speculative. The Carters, in their response brief, do not dispute CDLF's showing in the trial court that eviction will cause it to cease offering Migrant Head Start services at the Honeyville center. (R. 157, ¶ 6.) This showing is, of course, straightforward since the Carters' eviction of CDLF is designed to do just that: preclude CDLF from any further use of the Property. CDLF's showing does not end there, however.

CDLF also presented uncontroverted evidence showing that the consequences of eviction are extensive: CDLF will be unable to provide Migrant Head Start services to 172 young children and some 100 Hispanic families residing in Northern Utah and Southern Idaho; to offer continued employment to 58 of its current employees; to maintain its substantial improvements to the Property; and will cause it to lose credibility among its clients–that is, the migrant Hispanic families for whom it has been tasked by the Federal Government to provide Head Start services.

Based on the foregoing evidence presented in the trial court, CDLF demonstrated a "likely or threatened occurrence" of harm should injunctive relief not issue. *Dixon*, 669 P.2d at 428. The evidence that eviction will cause it to no longer have use of the Property, to cease providing necessary social services, be without any ability to maintain the improvements, to lose credibility among its clients, and be severely inconvenienced, is

uncontroverted. Accordingly, it was legal error for the trial court to (apparently) conclude that CDLF failed to present a threshold of evidence sufficient to demonstrate a "likely or threatened occurrence" of harm.

2. The trial court's finding of fact on irreparable harm was clearly erroneous.

Even if the trial court applied the correct legal standard to determine whether CDLF's showing of irreparable harm was not speculative, its finding of fact on this issue was clearly erroneous.

In its initial brief, CDLF marshaled the only evidence ostensibly supporting the trial court's refusal to find *any* facts presented by CDLF in support of harm, and its singular reliance on the October 7, 2000 *Deseret News* article attached to Mrs. Carter's affidavit to conclude that CDLF's alleged harm is "speculative."

Rather than meet CDLF's evidence, the Carters assert in their response brief that the updated facts which CDLF presented in its initial brief (*see* Appellant's initial brief at 26-28) "show it is able to open a new facility in order to accommodate its displaced clients." (Appe. Br. at 27.) They do not refer to Finding of Fact ¶ 33 (the *Deseret News* article), and otherwise make no attempt to defend this "fact." Therefore, as it was in the trial court, CDLF's showing of irreparable harm is uncontroverted. (It bears repeating that, even though CDLF's facts of harm were uncontroverted, the trial court did not find *any* of them.)

The Carters' (and trial court's) narrow focus on CDLF's ability to "open a new facility" understates the grounds for CDLF's showing of irreparable harm. As described above, CDLF showed in the trial court, and reaffirmed through the updated information it presented in its initial brief, that the Carters' demand that CDLF "vacate the premises immediately" (R. 279; 361) will cause direct and irreparable harm to it.

It is only at this point in the argument that the question of CDLF's ability to "open a new facility" becomes operative in the form of the Carters' attempt to controvert CDLF's above showing. In their response brief, however, the Carters do not show how the *Deseret News* article alone controverts CDLF's showing of harm.

The Carters incorrectly assert that "CDLF undercuts its own position with respect to the presence of irreparable harm, or the lack thereof, with the new evidence it presents in its Appellant's Brief." (Appe. Br. at 27.) CDLF does not suggest that it has never, and cannot ever, "open a new facility." Rather, it has offered uncontroverted evidence that, in the event of eviction from the Honeyville center, it cannot relocate to another comparable, nearby facility in Northern Utah or Southern Idaho.

There are two Migrant Head Start centers in Northern Utah and Southern Idaho–the Honeyville center, with a current enrollment of 152 children, and the Logan center, with a smaller current enrollment of 56 children–and they both operate at full capacity. Other than the Honeyville and Logan centers, there are only two other Migrant Head Start centers anywhere in Utah providing services to children under the age of 3 years, and they

are both located in Utah County and their current enrollment of about 56 children each is maximized. The Honeyville center is unique among the Migrant Head Start centers in Utah and Southern Idaho in that it is about three times larger than any other center.

That federal funding terminated on the Garland center, thus causing CDLF to close that facility effective July 31, 2003, and relocate the 62 children previously served from there, does not "undercut" CDLF's showing of irreparable harm. (Appe. Br. at 27.) Rather than rely on superceded information, CDLF disclosed in its initial brief that the 62 children in question were relocated by no longer busing 42 of those children from Logan to Garland, and enrolling the remaining 20 local children at the Honeyville center. When it opened its doors on August 1, 2003, the Logan center operated at full capacity of 62 children, and the Honeyville center's enrollment was maximized. These two facilities, as noted, remain the only Head Start centers in Northern Utah and Southern Idaho.

Thus, contrary to the Carters' assertion, the opening of the Migrant Head Start Program in Logan, the preparation and federal funding for which took years to complete, does not alter the important facts first presented by CDLF in the trial court: namely, the children currently served at the Honeyville center cannot be relocated to another Head Start center in the event the Carters are not restrained from evicting CDLF from the Property.

Accordingly, CDLF has demonstrated that the trial court's Finding of Fact ¶ 33 is so lacking in support of its conclusion that CDLF's evidence is "speculative" as to be

against the clear weight of the evidence, thereby making that finding clearly erroneous. *Searcy*, 958 P.2d at 232.

B. CDLF Has Shown a Likelihood of Success on The Merits of The Underlying Claim

1. The trial court failed to apply a "sliding scale" standard that, under the circumstances, relaxes the necessary showing of likelihood of success on the merits of the underlying claim.

In its initial brief, CDLF argued in favor of the application of a "sliding scale" to consider the factors of irreparable harm and likelihood of success on the merits of the underlying claim.[3] (App. Br. at 50.) The Carters do not, in their response brief, object to the application of a sliding scale. It is unclear whether the trial court applied a sliding scale standard, and the Conclusions of Law make no reference to such a standard.

The trial court's choice of a legal standard is reviewed by this Court for correctness, with no deference to the trial court's interpretation of law. *Hunsaker*, 991 P.2d at 69.

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[3] The balancing which takes place between the two factors is described as follows:

> . . . although a showing that plaintiff will be more severely prejudiced by a denial of the injunction than defendant would be by its grant does not remove the need to show some probability of winning on the merits, it does lower the standard that must be met.

Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 2948.3 at 197 (1995 ed.) (citing cases).

The trial court's apparent failure to apply a sliding scale was legal error. CDLF ended its initial brief with a description of the "sliding scale" analysis, which provides that the greater the showing of probable harm that may result if an injunction is refused, the lesser is the showing required of a likelihood of success on the merits of the underlying claim. Because irreparable harm is generally the most important ground for an injunction to issue, *Dixon*, 669 P.2d at 427, and CDLF's showing of irreparable harm is extensive, the trial court should have applied a sliding scale to consider CDLF's showing of the likelihood of success on the merits of its underlying claim for breach of contract.

In other words, the trial court should have, but apparently did not, apply a relaxed standard to decide whether CDLF satisfied the fourth factor (likelihood of success on the merits) of the Rule 65A(e) test for injunctive relief to issue. That relaxed standard should be applied as part of this Court's review of the trial court's ruling.

2. Oral Agreement to Convey The Property to CDLF.

The Carters, in their response brief, focus their main attention on the trial court's conclusion that CDLF did not show a substantial likelihood of success on its claim that an oral agreement to convey title existed between the parties. Stated variously between pages 16 and 23 of their response brief, the Carters assert that "the Carters never expressed a sufficient intent to be bound by the alleged oral contract to convey title"; "there was no definite agreement"; and that their statements reported in several newspapers showed "the absence of a firm commitment" or showed only a "mere promise for future performance."

The trial court's findings of fact in support of this interpretation of events require a re-writing of the undisputed documentary evidence. On September 28, 2000, just after the purchase of the Property, Mrs. Carter was photographed by the *Box Elder News Journal* shaking hands with Ronald Frandsen, the Box Elder School District's Administrative Assistant/Business, and never objected to a caption accompanying the published photograph that stated: "The couple paid $72,500 for the 80 year old building and plan on turning the property over to Centro de la Familia to house their Head Start program." (R. 118; Appendix D.) Mrs. Carter would have this Court believe that she was so honored by the local media even though "turning the property over to" CDLF actually meant a stay of only four months–the period between the completion of the improvements and the end of the two year lease agreement.

Similarly, the School District Board's Minutes, which stated that "[t]heir [the Carters'] intent is to gift the property in turn to Centro de la Familia de Utah for use in their program" (R. 365, ¶ 13), was actually a gift of only four months of occupancy, to be followed a few months later by two written demands from counsel that CDLF, along with 130 young children and 58 employees "vacate the premise immediately." Or that when the *Standard-Examiner* reported that Mrs. Carter had "promised her school to Centro de la Familia," and was quoted as saying that she had "kind of made that dream happen" (R. 117; Appendix C), she actually meant a dream lasting only four months.

The truth, of course, is otherwise: the Carters induced CDLF to improve the Property by promising to convey title at the completion of the substantial improvements. The Minutes of CDLF's Board of Directors meeting of September 29, 2000–that is, a day after the Carters closed on the purchase of the Property–succinctly described the parties' oral agreement: "Honeyville has been signed and bought by the Carters. We will enter into a rental agreement with the Carters. They will donate the monthly rent until they pass title to CDLF in a few months." (R. 477; Appendix E.) Two weeks later, CDLF issued "Request for Proposal for Architect" letters to certain local architects, thus marking the beginning of the 18 month long process that rehabilitated the Property, at a cost of more than $680,000, before CDLF began occupying it on June 1, 2002. The Carters do not discuss the foregoing Board Minutes in their response brief.

The Carters base their defense of the trial court's findings of fact on three pieces of evidence: the March 23, 2001 letter, lease agreement, and pledge agreement.

The Carters place primary reliance on the March 23, 2001 letter. This letter, they contend, is evidence of their true intent, as of its date, to offer CDLF a long term lease.[4]

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[4] The letter states:

> Dear Dr. Italiano Thomas:
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> Dream Chaser LLC is now owned by The Carter Family Foundation. The lease entered into by Dream Chaser LLC and Centro de la Familia de Utah is still in force for the two-year period specified. At the end of the lease, Dream Chaser LLC and/or The Carter Family Foundation intend to renew the lease for a period of ten years and for subsequent periods of ten years in

During the parties' more than six months of dealings before that, Mrs. Carter alleged in her affidavit, the Carters had remained subjectively undecided as to whether they would transfer title to CDLF. (R. 286, ¶ 39.) Based on the delivery of the March 23 letter, the trial court concluded that CDLF's "subsequent expenditures could be viewed as evidencing [its] intention to be subject to the offered long-term lease." (Appe. Br. at 26, citing Conclusion of Law ¶ 26, R. 603, Appendix L.)

The clear weight of the uncontroverted evidence shows, however, that CDLF began the process of rehabilitating the Property no later than October 16, 2000, or more than five months before the March 23, 2001 letter was sent to Ms. Italiano-Thomas. By the time it received the letter, CDLF had expended at least $13,320. (R. 471, ¶ 20.) Moreover, the clear weight of this evidence also negates the trial court's conclusion that the improvements are referable to the lease agreement. (Appe. Br. at 26, citing Conclusion of Law ¶ 13, R. 603, Appendix L.) The lease agreement was not signed until two months after CDLF changed its position and began the process of improving the Property.

Thus, contrary to the trial court's conclusion, the uncontroverted evidence shows that CDLF began the improvements on October 16, 2000 pursuant to its understanding that the Carters would, as reported in the Board Minutes on September 29, " pass title to

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> perpetuity until such time as the lease is broken by your party or the facility is no longer needed.

(Appendix I.)

CDLF in a few months." (R. 477; Appendix E.) In other words, CDLF acted in reliance on the then presently existing oral agreement, and not two future occurrences–the two year lease agreement and a long term lease.

Indeed, a long term lease, which the trial court concluded was the basis for CDLF's expenditure of more than $680,000, never even materialized. Although the March 23 letter states the Carters "intend to renew the lease for a period of ten years and for subsequent periods of ten years," the letter obviously was not a formal offer, and in fact the Carters never delivered a proposed draft of a long term lease. In her affidavit, Mrs. Carter does not assert that she ever even discussed a long term with Ms. Thomas of CDLF.

In its response brief, the Carters continue to argue that CDLF's expenditure of more than $13,000 before March 23, 2001 "was not significant enough to support consideration for the oral contract CDLF contends was created." (Appe. Br. at 24.) To support this proposition, the Carters look to the doctrine of part performance requirement that the improvements to the property must be "substantial and valuable."

This argument fails because a determination of the sufficiency of consideration to make a contract must be made on the basis of contract principles, not the equitable doctrine of part performance. The uncontroverted evidence shows that CDLF expended more than $680,000 to rehabilitate the Property, an amount that easily satisfies the low threshold for

sufficient consideration. *Gorgoza v. Utah State Road Com'n*, 553 P.2d 413, 1416 (Utah 1976).

As stated in the initial brief, the March 23 letter was in fact an attempt to revoke the existing oral agreement to convey title. The Carters never delivered a draft of a long term lease, presumably because they knew that CDLF never accepted their offer to modify the existing agreement to convey. Therefore, because there was an oral agreement to convey before the letter was received, the trial court incorrectly concluded that CDLF's silence in response to the letter meant it had accepted the offer of a long term lease.[5] (Appe. Br. at 26, Conclusions of Law ¶ 12, R. 603, Appendix L.)[6]

3. Doctrine of Part Performance.

(a) <u>The trial court failed to apply a relaxed standard to assess CDLF's evidence of part performance.</u>

No only do the Carters, in their response brief, ignore CDLF's argument in favor of the application of a "sliding scale" standard, they also ignore its argument in favor of

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[5] The trial court's conclusion also conflicts with the Carters' pleadings in this case. The trial court apparently found that CDLF began the on-site improvements in May 2001 pursuant to the Carters' March 23 letter offering a long term lease. However, in their Answer and Counterclaim filed in July 2002, the Carters expressly purported to revoke that offer of a long term lease after CDLF had expended the $680,000. Obviously, the Carters felt they could revoke the March 23 offer of a long term lease because they knew that CDLF had never accepted it, or acted in reliance upon it.

[6] The evidence of the pledge agreement briefly discussed in the Carters' response brief is inconclusive, and must await discovery of the parties then attorneys to clarify the matter.

the application of a relaxed standard where evidence is presented of the oral agreement to convey independent of the improvements made to the Property. Here again the trial court's Conclusions of Law do not refer to such a standard. The application of this relaxed standard also presents a legal question that is reviewed for correctness. *Hunsaker*, 991 P.2d at 69.

As explained in CDLF's initial brief (App. Br. at 41-42), the element of exclusive referability is " an evidentiary requirement of equity that the facts speak for themselves.'" *Martin v. Scholl*, 678 P.2d 274, 278 (Utah 1983) (*quoting* "The Doctrine of Part Performance as Applied to Oral Land Contracts in Utah," 9 *Utah Law Review* 91, 105 (1971)). "As a corollary, where either independent acts which prove the contract can be found, or an admission of the contract is present, the requirement of exclusive referability may be relaxed because the evidentiary concern is assuaged by either the admission or the independent acts." *Id. See also, In re Roth's Estate*, 269 P.2d 278, 281 (Utah 1954) (stating: "[w]here existence of the oral contract is established by . . . evidence independent of the acts of part performance, the requirement that the acts of part performance must be exclusive[ly] referable to the oral contract is satisfied.. . .").

In light of the evidence of independent acts presented in the trial court (*see* discussion in Appellant's initial brief at 41-44), the trial court should have, but apparently did not, apply a relaxed standard to decide whether CDLF satisfied the exclusive referability component of the fourth factor of the Rule 65A(e) test for injunctive relief to issue. This

was legal error. That standard, which relaxes the evidentiary requirement that the applicant prove the acts of performance are exclusively referable to the oral agreement to convey, should be applied as part of this Court's review of the trial court's ruling that CDLF failed to remove the bar of the Statute of Frauds based on the equitable doctrine of part performance.

(b) CDLF's improvements were "substantial and valuable."

The Carters challenge CDLF's evidence of part performance by contending that the improvements had to be "substantial and valuable" as of the date before the delivery of the March 23 letter. There is, however, no legal basis for the Carters to limit CDLF's acts of performance to the architect work that was completed before the March 23 letter was sent.

The case law applying the doctrine of part performance requires only that "any improvements made on the property must be substantial and valuable." *Bradshaw v. McBride*, 649 P.2d 74, 79 (Utah 1982). As applied, this requirement means that an expenditure that is "ancillary to" the real property may not be legally sufficient. *See Baugh v. Logan City*, 495 P.2d 817 (Utah 1972) (affirming trial court's summary judgment in favor of defendant because plaintiff's part performance allegedly consisted of a survey of the real property in question). But *Baugh*, which the Carters rely on, is readily distinguishable because, in addition to the $13,000 it expended on architect work, CDLF made actual on-site improvements worth an additional $670,000.

However, the issue is not, as the Carters contend, whether CDLF's improvements are "legally insufficient"-clearly the improvements rehabilitated the Property and were substantial and valuable-but rather whether they are referable to the oral agreement to convey. That issue necessarily focuses attention on the timing of CDLF's first steps to begin the process of improving the Property. Those first preparatory steps took place more than five months before the March 23, 2001 letter was sent.

Accordingly, it was legal error for the trial court to ignore CDLF's on-site improvements on the basis of the holding in *Baugh*. The vast majority of the improvements were made on the Property. The improvements were begun in October 2000 pursuant to the parties' oral agreement to convey, and continued on that basis until completion some 18 months later. No long term lease was ever formally offered or delivered to CDLF , and therefore the improvements were never referable to it.

C. The Carters Have Not Shown They Will be Harmed by The Proposed Injunction.

Although they did not make the argument in the trial court, and presented no evidence there in support of the proposition, the Carters now contend they will be harmed by the issuance of the proposed injunction. The alleged harm of attorney's fees and costs, and holdover rent, however, are not, standing alone, meaningful. The second factor of the test under Rule 65A(e) considers not merely alleged harm to the party restrained, but rather calls for a balancing of harm to determine whether "[t]he threatened injury to the

applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined." Utah R. Civ. P. 65(A)(e)(2).

The Carters do not allege real harm to themselves. Incurring attorney's fees and costs in litigation is unavoidable, and the Carters cannot be heard to complain about those fees and costs when their two demands that CDLF "vacate the premises immediately" were the cause of this injunction proceeding. Moreover, they may, without conceding the point, have an opportunity to request recovery of fees and costs should the trial court's denial of injunction be affirmed on appeal. *See Tholen v. Sandy City*, 849 P.2d 592, 596-97 (Utah App. 1993). The Carters will not, as they contend, suffer harm of holdover rent should an injunction issue. Should CDLF prevail on the merits of the breach of contract to convey title of the Property, the Carters will not be entitled to holdover rent of any kind; and should CDLF fail to prevail, the holdover provision of the two year lease agreement governs the matter.

Because CDLF's showing of irreparable harm far outweighs the harm, if any, the Carters allege will result should an injunction issue, CDLF satisfies the second factor of the Rule 65A(e) test.

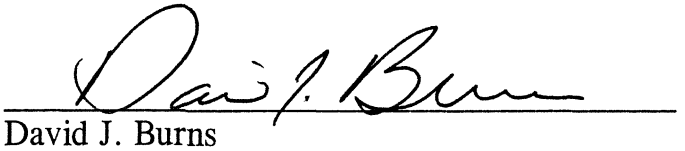
D. The Carters Do Not Dispute CDLF's Showing That an Injunction Would Not be Adverse to The Public Interest.

Nowhere in their response brief do the Carters object to CDLF's showing that an injunction would not be adverse to the public interest. Therefore, the Carters do not dispute that CDLF satisfies the third factor for an injunction to issue under Rule 65A(e).

CONCLUSION

CDLF respectfully requests that the trial court's denial of the motion for preliminary injunction be reversed, and the matter be remanded for the entry of an order enjoining the Carters from evicting, or continuing to threaten to evict, CDLF from the Property during the pendency of this case.

RESPECTFULLY SUBMITTED this 14th day of November, 2003.



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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2003, I served two (2) copies of the fore-going **REPLY BRIEF OF APPELLANT** by hand-delivery upon the following:

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